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EXAMINER	
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The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ERIC LENNON, THOMAS BROCK,
BRYAN HAYNES, and DOUGLAS HULSLANDER

Appeal 2010-005996
Application 10/694,153
Technology Center 1700

Before CHUNG K. PAK, CHARLES F. WARREN, and
ROMULO H. DELMENDO, *Administrative Patent Judges*.

PAK, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Pursuant to 37 C.F.R. § 41.52(a)(1), Appellants request rehearing of our Decision of June 29, 2012 ("Decision"), affirming the Examiner's rejection of claims 1, 11, and 23 on the ground of nonstatutory obviousness-type double patenting as unpatentable over claim 1 of copending Application 10/687,006 (now U.S. Patent No. 7,504,060 B2). (*See* the Request for Rehearing ("Req.") dated July 9, 2012, 1-2.)

Appellants specifically request that:

> [T]he Board to reconsider its affirmance of rejection (11) [sic, rejection (12)] for obviousness-type double patenting. The affirmance is believed to be improper because as expressly stated in the Advisory Action mailed on June 2, 2009, the

> obviousness-type double patenting rejection was overcome by the argument on pages 8-9 of applicants' March 2009 Response to Final Office Action. Thus, this obviousness-type double patenting rejection was eliminated from the case. Accordingly, the Board lacked jurisdiction over any such obviousness-type double patenting rejection. [(*See* Req. 1.)]

Contrary to Appellants' arguments, however, the Examiner has never withdrawn the rejection of claims 1, 11, and 23 on the ground of nonstatutory obviousness-type double patenting as unpatentable over claim 1 of copending Application 10/687,006 (now U.S. Patent No. 7,504,060 B2) set forth in the final Office ("FA") action dated March 3, 2009 and the Answer ("Ans.") dated November 9, 2009. As acknowledged by Appellants at page 2 of the Request for Rehearing, the Advisory Action ("AA"), mailed June 2, 2009, indicates that only "the non-statutory obviousness-type double patenting rejection of claims 1, 11, 23 over claims 1, 5, and 11 of US. Patent No. 7,448,411 B2" was withdrawn. (*See also* AA 2, FA 4, Ans. 3 and Decision 2, footnote 3.)

It follows that the nonstatutory obviousness-type double patenting rejection of claims 1, 11, and 23 over claim 1 of copending Application 10/687,006 (now U.S. Patent No. 7,504,060 B2) maintained in the Answer was properly before us.[1] Accordingly, we find no reversible error in our Decision affirming the nonstatutory obviousness-type double patenting

[1] Even if the Examiner has erroneously not designated any obviousness-type double patenting rejection set forth in the Answer as a new ground of rejection, it is properly before us when Appellants fail to file a petition in a timely manner to designate the rejection as a new ground of rejection and/or fail to choose an option to further prosecute before the Examiner.

rejection of claims 1, 11, and 23 as unpatentable over claim 1 of copending Application 10/687,006 (now U.S. Patent No. 7,504,060 B2).

In conclusion, based on the foregoing, we have granted Appellants' request to the extent that we have reconsidered our Decision, but we deny Appellants' request to make any change therein.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

DENIED

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